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IN THE

Supreme Court of the United States

ALEXANDER PASTENE

Petitioner,

v.

MARY ANN PIKKERT

Respondent.

On Petition For Writ Of Certiorari
To the Supreme Court of South Carolina and
The United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Alexander Pastene
Appearing *pro se*
Post Office Box 22298
Hilton Head Island, South
Carolina, 29925
(843) 384-2693

QUESTIONS PRESENTED

1. Does the Petitioner possess the constitutional right to have a Jury examine and decide a dispute about the new terms and conditions of a contract, which had been guaranteed by mortgage, but was never defaulted, and as sufficient evidence shows, was subsequently modified between the decedent lender and the borrower?

2. Does the Petitioner have the right to remove a case from state courts to federal courts if he is denied his constitutional right to have a Jury of his peers examine and decide a dispute about the new terms and conditions of a contract, which had been guaranteed by mortgage, but was never defaulted, and, was subsequently modified by parol agreement between the decedent lender and the borrower?

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JURISDICTION

This Honorable Court has jurisdiction under 28 U.S.C. including §1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Article III , and Amendments VII and XIV, of the United States Constitution.

"The Judicial power of the United States shall extend to all cases, in Law and Equity, arising under this Constitution..."

"In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in an Court of United States, than according to the rules of the common law."

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

South Carolina Code, SCRCP Rules, *inter alia*, 38, 71

STATEMENT OF THE CASE

Historical background

During 1993, the Petitioner Alexander Pastene executed a promissory note in favor of the late Geert Jan Pikkert (the decedent lender) and a few months later he secured it with a first mortgage on his 45 acre parcel of land located in Gillisonville, South Carolina, and started making monthly payments on the loan.

Subsequently, during 1994, Geert Jan Pikkert (the lender) and Alexander Pastene (the borrower) modified their agreement, whereas the late Geert Jan Pikkert (the lender) advanced Alexander Pastene additional funds in the form of three unsecured loans to be used mainly to make improvements on the borrower's subdivided property, to then sell the lots.

Under the new agreement *ubi supra* the borrower Alexander Pastene was to discontinue all monthly payments on all loans, and use all funds to invest in forestation, improvements on the land, build roads, secure permits from the Jasper County Planning Commission and other government institutions, and subdivide the land into thirteen (13) three-acre estates, market, and sell the lots. Upon the sale of the lots the borrower Alexander Pastene would repay the lender Geert Jan Pikkert principal plus interest on a "pay as the lots are sold" basis.

At this point it is important to note that in 1994 the decent lender Geert J. Pikkert made the three (3) subsequent loans to the borrower Alexander Pastene on an unsecured basis for a period of about seven (7) months after the borrower Alexander Pastene had interrupted all monthly payments on all loans, as agreed, which supports the contract modification allegations made by the Petitioner.

Sometime during 1999, the decedent lender Geert Jan Pikkert suffered an accident which caused him serious enough injuries to subsequently claim his life. However, during the time following the accident, Mary Ann Pikkert, wife of Geert Jan Pikkert (the lender) coerced both the disabled Geert Jan Pikkert (the lender) and Alexander Pastene (the borrower) into signing a new agreement, which lacked any consideration, which would include all secured and unsecured promissory notes plus interest accrued, and secure the new agreement with a new mortgage, which the borrower Alexander Pastene was compelled to sign in January of 2000. Following Geert Jan Pikkert died.

Chronology of events
following Geert Jan Pikkert's death.

On July 2001, Mary Ann Pikkert (Respondent) wife of the decedent lender Geert Jan Pikkert filed a complaint for mortgage foreclosure (non-jury) against Alexander Pastene (the borrower), in the Court of Common Pleas, Fourteenth Judicial District, which was served on Alexander Pastene on August 13, 2001.

On December 2001, the Honorable Judge Perry Buckner denied Alexander Pastene's motion for Jury Trial, and referred the case to Special Referee.

On February 2002, Alexander Pastene (the Petitioner) filed Notice of Appeal with The South Carolina Court of Appeals.

On March 2002, the Honorable South Carolina Court of Appeals dismissed the appeal without prejudice, because the order is not immediately appealable.

On September 2002, Alexander Pastene (the borrower and Petitioner) petitioned for writ of certiorari with the South Carolina Supreme Court.

On December 2002, the Honorable Supreme Court of South Carolina denied Alexander Pastene (the borrower and Petitioner) his petition for writ of certiorari and ordered the case remitted to the Clerk of Court of Jasper County.

On January 2003, Alexander Pastene (the borrower and Petitioner) filed a Notice of Removal with the United States District Court for South Carolina.

On January 27th, 2003, The United States District Court ordered the case to be remanded to the Court of Common Pleas, Fourteenth Judicial District.

On April 7th, 2003, Alexander Pastene (the borrower and Petitioner) filed an appeal with the United States Court of Appeals, Fourth Circuit.

On May 20, 2003, The United States Court of Appeals for the Fourth Circuit, dismissed the Appeal.

On June 9th, 2003, Pastene filed a Motion for Rehearing with The United States Court of Appeals.

On June 30, 2003, The United States Court of Appeals for the Fourth Circuit denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT
STANDARD OF REVIEW

The United States Constitution clearly grants the right to trial by jury on all matters at common law, including those cases where the common law matter is incidental to a main action of equitable nature.

Furthermore, the denial of a Constitutional right to determination by jury to decide on a matter purely at law, falls within the realm of the federal jurisdiction and thus, if denied in State Court is removable to Federal Court according to 28 USC §1441, regardless of the amounts involved in the controversy and the citizenship of the parties.

As will be shown, the standard adopted by the State Courts as regards Trial by Jury, and the standard adopted by the Federal Courts in reference to Removal from State Court to Federal Court, conflict with the rights guaranteed by the Constitution of the United States to the Petitioner, a United States Citizen.

I. Determination by Jury.

The VII Amendment of the United States Constitution states that. "In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in an Court of United States. than according to the rules of the common law."

Additionally, Article III of the United States Constitution Section 2, states that, "..In all other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make."

Determination of common law and trials by jury are fundamental guarantees of the rights and liberties of the People, so, every reasonable presumption should be indulged against its waiver. *See* Hodges v. Easton. 106 US 408, 1S Ct 307. 27 Led 169.

Generally. in suits at common law a jury trial is a right guaranteed *ibidem* by the Seventh Amendment of the United States Constitution, and contract modifications are matters at-law to be decided by Jury even in cases where the main action is of equitable nature, as a mortgage foreclosure, for instance. Therefore, a deprivation of right to determination by jury of the facts surrounding contract modification becomes a federal subject matter arising under the jurisdiction of the Federal Courts.

Given that a mortgage is a guarantee of a valid contract, and not a contract *per se*, then, it follows that, if a contract guaranteed by mortgage is modified, then, the mortgage is modified, withal, and the determination of the factual issues surrounding the new modified contract becomes an action at-law for a jury to decide, not a Referee, which denial of jury

determination deprives a party of a mode of trial to which he is entitled as a matter of right arising from the Constitution and federal law.

Furthermore, *ibid*, if the contract is subsequently modified even by parol agreement, then, the mortgage is equally modified, for, the factual issues surrounding contract modification are a matter purely at-law, and, thus, decidable by a Jury. *See* Patterson v. Rabb 38 SC 138. *See* Dairy Queen v. Wood. 8 L ed 2d 44.

"In many instances it is the court judge or a special referee who makes decision in cases of mortgage foreclosure although, in many other cases, which may involve promissory notes, mortgages, and actions to foreclose, in matters where the contested contracts may be at law, the facts may be decided by a jury, first, or the case may be remanded to the circuit court to take further evidence, especially, when the promissory notes in question are in dispute."
See Corpus Juris Secundum, 17B § 421 to end.

Equally, an action to construe a contract is an action at-law, reviewable under "any evidence" standard. *See*, Fleets v. Richland County, 303 S.C. 354, 400 SE 2d 781 (1991).

Also, whether a litigant has a right to jury determination depends on the nature of the issue to be tried rather than the character of the overall action; the legal nature of an issue. *See* Ross v. Bernhard, 396 US 531, 90 S Ct 733, 24 L ed 2d 729. Also, *See* Frank IRey v. Occupational Safety, 519 F2d 1218.

Incidentally, when determining whether a contract exists, the intention of the parties should be determined from surrounding circumstances, as well as from testimony of all witnesses, and subsequent acts that are relevant to show that contract or parol contract-modification was intended. *See*, Wright vs. Trask 495 SE 2d 222, 329 SC 170 (1997).

If a legal claim is joined with an equitable claim, the right to jury determination on the equitable claim, including all issues common to both claims remains intact; the right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought. *See* Tull v. United States 481 US 412, 107 S Ct 1831, 24 Led 2d 729.

Under principles long since established, a defendant cannot be deprived of his Constitutional right to a jury determination on the legal claim contained in his compulsory answer. *See* Scott v. Neely, 140 US 106, 100 35 Led 358, 360, 11 S Ct 71.,

As regards a party's characterization of a case as a "mortgage foreclosure", a cause of action is not the form of action in which a claim is asserted, but, rather the cause for action, meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon. See 50 Corpus Juris Secundum §749 (1997).

Although often the right to decision by jury may be determined by the plaintiff's claim, the matter is often controlled by the nature of the defense asserted and the particular issue to be tried, rather than the character of the overall action, otherwise, it would be tantamount to basing solely on the Plaintiff the arbitrary selection of jurisdiction in a civil action, which was certainly not the intent of Congress or the laws of the United States.

Additionally, the Constitutional right to civil determination by jury in federal court cannot be made to depend upon the choice of words used in the pleadings, and only under the most imperative circumstances can the right to a jury determination of legal issues be lost through prior determination of equitable claims. *See* United States Supreme Court ruling in Dairy Queen v. Wood, 8 L ed 2d 44.

When legal and equitable issues to be decided in the same case depend on common determinations of fact, such questions of fact are submitted to a jury, and the court in resolving the equitable issues is then bound by the jury's findings on them. *See* Ag Services of America v. Nielsen 231 F3d 726, 730 (10th Cir 2000) (Citing Beacon Theaters v. Westover, 359 US 500, and Dairy Queen v. Wood, 369 US 469, 8 L.ed 2d 44). Smith v. Diffee Ford-Lincoln, 298 F3d 965 (10th Cir 2002).

II. Removal from State to Federal Courts:

The denial of a Constitutional right to determination by jury to decide on a matter purely at law, even where that matter is merely incidental to the main equitable complaint, it falls within the realm of the federal jurisdiction, and is thus, removable, regardless of the amounts involved in the controversy and the citizenship of the parties. See 28U.S.C.§§1332(a) 1441(a).Shwem v. Sear Roebuck 822 F Supp 1453.

Additionally, claims asserted in State Court, no matter how they may be characterized by a Plaintiff, are removable to Federal Court where the claims are necessarily Federal in character by virtue of the clearly manifested intent of Congress. *See* Tennessee Gas Pipeline Co.v. Houston Gas Co., 881 F.Supp 245.

Whether the case has been properly removed is largely determined by reference of the Plaintiff's state court complaint; while the range of federal judicial authority is by no means bound by the phrasing of that complaint, and the federal court will disregard the plaintiff's characterization of his action and appropriate parties thereto only were necessary to avoid unjust manipulation of avoidance of its jurisdiction.See, Lyon v. Centimark Corp. 805 F.Supp.

Where jury determination in matters at-law are denied at state level, then, it becomes a federal subject matter jurisdiction, because, the denial of a Constitutional right which arises under United States law, determines federal question jurisdiction. *See* Caudill v. Blue Cross Blue Shield of NC 999 F.2d 74.

Furthermore, the federal district court has no discretionary authority to remand to state court a case over which it has subject matter jurisdiction. *See* Buchner v. Federal Deposit Insurance, 981 F2d 816.

Also, "arguable cause of action" implicates subject matter jurisdiction. *See* 140 L Ed 2d 210. (1998). And, subject matter jurisdiction is a court's statutory or constitutional power to adjudicate the case. *See* US v. Cotton, 122 Ct 1781, 152 L Ed 2d 860. (2002).

Additionally, the duty devolves upon federal court at any time jurisdictional question is presented, to proceed no further, until the question is determined. *See* Page v. Wright, 116 F 2d 449.

The federal officials' ability to remove state court proceedings to Federal Court is not limited to full fledged civil or criminal proceedings, but, rather, extend to matters such as subpoenas, including legal matters that are part of equitable cases, which are only incidents of civil and criminal actions. See Maddox v. Williams 855 F supp 406. (1994)

Although the court is generally limited to examining the face of the complaint, if it appears that a Plaintiff seeks to conceal the federal nature of his claim by fraud or obfuscation, the court may look behind the complaint to ascertain the facts that would appear in a well-pleaded complaint. *See*. Cheshire v. Coca Cola Bottling Affiliated Inc. 758 Supp 1098. Title 28 USCA § 1447.

The modern view is that removal jurisdiction is more

like original jurisdiction, because the case, after the removal, is treated as if it had been commenced in federal court. Once the case is removed the District Court has jurisdiction over the entire case. 28 US 1441(c). *See* Resolution Trust Corp. v. Bayside Developers, 43 F 3d, 1230 as amended, and, Commonwealth. of Massachusetts v. V&M Management 929 F 2d 830.

ANALYSIS AND DISCUSSION

I. Determination by Jury.

Why has the Respondent, Mary Ann Pikkert, and her attorney been adamant *ab initio* in denying the Petitioner his right to have a jury of his peers decide --not a mortgage foreclosure-- but, the terms and conditions of the modified parol agreement between her late husband and the Petitioner, in the first place?

The instant case involves a mortgage foreclosure aotion by Mary Ann Pikkert (the Respondent) who is the widow of the late Geert Jan Pikkert (the decedent lender) for monies advanced by Geert J. Pikkert to Alexander Pastene, the borrower and Petitioner, under a subsequently modified agreement, which resulted in a quasi association between the late Geert Pikkert and Alexander Pastene to sell the lots of a subdivision and pay the loans plus interest as the lots are sold.

Oakton Hill is the mortgaged property in dispute. and is located in Gillisonville, Jasper County, South Carolina, which was platted in 1996 as a residential subdivision. The plat shows a 13-lot development and was approved by the Jasper County Planning Commission as a final plat in July 1997. *See* copies of the13-lot development subdivision appended to defendant's responses, marked exhibits 4A,5A,6A. 7A, 8A, and 9A. Meanwhile, Gillette is not a defendant.

The Respondent, Mary Ann Pikkert, was never a party to any of the agreements in the case *sub judice* between the late Geert Jan Pikkert and Alexander Pastene, who alleges that Mary Ann Pikkert (the Respondent) may have wrongly characterized her action by portraying it as mortgage foreclosure (a purely equity matter) based on a false claim of default by Mary Ann Pikkert involving contracts guaranteed by mortgage which had been subsequently modified (a purely legal matter) between Geert Jan Pikkert and Alexander Pastene. Meanwhile Alexander Pastene (the Petitioner) was deprived of his right to have a jury of his peers decide on the new terms of the modified agreement, first.

Notwithstanding, the differences between at-law and in-equity cases and courts, including the equitable nature of mortgages and mortgage foreclosures, the right to have a jury decide on the legal --as opposed to the equitable-- matters in a case, is not lost as to the legal issues merely because those issues are incidental to the equitable issues. The Petitioner, Alexander Pastene had claimed, *ab initio*, that:

1. There was no default on his part in any of the loans with Geert J. Pikkert (the late lender) and thus, there was never breach of contract. That it is widely accepted in Common and Equity Law that there cannot be foreclosure in the absence of default, and that a mortgage is only a guarantee of a valid contract which depends totally on the terms of the contract;

2. There had been a subsequent valid and enforceable contract modification (a legal matter) between Geert J. Pikkert and Alexander Pastene; *See* S Hanson Lumber v. De Moss 253 Iowa 204, Ill NW 2ed 651;

3. That, It is Alexander Pastene's Constitutional right to demand a jury to determine the factual issues surrounding his subsequent parol agreement with the late Geert J. Pikkert, which modified the terms of the original contract, inasmuch as the legal (as opposed to

equitable) issues are incidental to Mary Ann Pikkert's equitable action. That only under the most imperative circumstances can the right to jury intervention to resolve legal issues be lost through prior determination of equitable claims. *See* Tull v. United States 481 US 412, 107 S Ct 1831, 24 L ed 2d 729, and *See* Dairy Queen v. Wood, 369 US 469, 8 Led 2d 44;

4. That on the one hand in the case at bar enough *prima facie* evidence and consideration exist to support the validity of the modified agreement between Geert J. Pikkert and Alexander Pastene, whereas on the other, there is total absence of consideration, *id est*, the final promissory note which was forced on both Geert J. Pikkert (the incapacitated and decedent lender) and Alexander Pastene, to sign under the duress of Mary Ann Pikkert.

Prior to the consolidation of all debts plus interest into a new promissory note without consideration, the decedent lender Geert J. Pikkert had indicated to the Petitioner his fear of not being taken care during his serious illness by his wife Mary Ann Pikkert, so much so, that the Petitioner offered the late Geert Jan Pikkert to come and live with him for, he would take care of him disinterestedly and properly, thus eliminating his need for any fear.

Evidence which had remained undisclosed by the Mary Ann Pikkert (the Respondent) after the ruling of the state courts, revealed that three of the four promissory notes executed by Alexander Pastene in favor of the late Geert Jan Pikkert were unsecured, despite all previous and posterior monthly payments having been interrupted after the new contract modification between the late Pikkert and Pastene. Which new evidence discovered by Alexander Pastene, was seemingly left undisclosed by Mary Ann Pikkert, but supports the absence of any breach of contract, and, to the subsequent a parol agreement modification between the decedent lender and the Petitioner, withal.

Specifically, the new evidence revealed that three unsecured loans by Geert Jan Pikkert to Alexander Pastene were made consecutively over a period of about seven (7) months after all monthly payments by Alexander Pastene to the decedent lender had been discontinued by their new agreement, while the aforementioned payment interruption perdured for seven (7) years prior and two (2) years following the decedent lender's incapacitating accident, as follows:

1. A $33,000.00 secured note with mortgage, executed on July 1st, 1993;
2. A $15,000.00 unsecured note dated January 1st 1994;
3. A $5,000.00 unsecured note dated April 25, 1994;4.
4. A $5,000.00 unsecured, note dated July 1st, 1994.
5. A $94,480.00 secured note without consideration, where no exchange of any monies, things or services had taken place, was forced on both, the injured Mr. Geert Pikkert, and Alexander Pastene, by the duress of Mary Ann Pikkert.

Normally, a lender will not award additional loans to a borrower who is in default of any previous loans with the lender and had failed to make his monthly mortgage payments.

Whereas, the unsecured nature of the subsequent unsecured loans advanced made by Geert J. Pikkert to Alexander Pastene, pursuant to their new agreement, were left undisclosed hitherto by both Mary Ann Pikkert and her attorney since the inception of the instant case which obscured the nature of the subsequent agreement between Geert Jan Pikkert and Alexander Pastene, seemingly for the purpose of collecting the proceeds from the loans plus interest immediately, and not upon the sale of the lots, as agreed between her late husband Geert J. Pikkert, and Alexander Pastene.

Meanwhile, in her complaint, Mary Ann Pikkert and showed to the courts copies of only the secured notes, but failed to show the unsecured notes for funds advancements by the decedent Geert J. Pikkert after all monthly payments had been interrupted by the Petitioner Alexander Pastene thus, supporting the theory of new parol agreement modification and quasi association between Geert Pikkert and Alexander Pastene to sell the lots first, and then pay for the principal plus interest, as the subdivision lots are sold.

Incidentally, Geert J. Pikkert was in the business of buying, improving, and selling real estate property, so, this new arrangement between Geert Jan Pikkert and Alexander Pastene was a customary one.

The Petitioner claims that by withholding critical information and denying Alexander Pastene his right to have a jury decide on the controverted facts surrounding his new agreement with Gear Pikkert, he was deprived of a mode of trial to which he is entitled under the US Constitution.

The Petitioner argues that Mary Ann Pikkert's actions to foreclose a mortgage which had not been defaulted, and deny Alexander Pastene his right to have a jury determine the details of his subsequent agreement with the late Geert Pikkert, first, caused, and is causing, Alexander Pastene serious losses, because, had he been allowed to make the repayment of all loans plus interest with the proceeds of the "sold lots" as agreed, no losses would have occurred.

Clearly, by having deprived Alexander Pastene of his right to have a jury expeditiously determine the facts surrounding the new agreement between him and Geert Pikkert (the decedent lender), the Respondent Mary Ann Pikkert actually prevented the Petitioner from selling his property, and forced him to incur additional interest on the debt.

Finally, the Respondent, Mary Ann Pikkert consistently plead throughout the court proceedings to impose additional penalties, attorney fees, and sanctions against Alexander Pastene for "delaying" this case, whereas, it is clear that it is the Respondent Mary Ann Pikkert who delayed, *ab initio*, the quick resolution of the instant case by not abiding by the decedent lender Geert Jan Pikkert's agreements, and by preventing Alexander Pastene from exercising his constitutional right to jury trial to determinate the factual issues surrounding his contract modification with the late lender Geert Pikkert, which is a legal matter for a jury to decide.

II. Removal from State Court to Federal Court.

The Petitioner, Alexander Pastene, sought removal of this action to federal court on the grounds that the district court has original jurisdiction founded on claims and rights arising under the Fifth and Seventh Amendments of the Constitution of the United States, and Federal Statutes.

Title 28 § 1331 states: "The District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States".

Although generally mortgage foreclosures are not matters at law, but in-equity, instead, the Respondent Mary Ann Pikkert made every attempt to deprive the defendant of his Constitutional rights to determination by Jury to decide on the new terms, conditions, and circumstances surrounding a subsequent parol contract modification between the parties Geert J. Pikkert and Alexander Pastene, by seemingly withholding critical evidence from the courts and Alexander Pastene.

Notwithstanding, actions involving purely equitable relief may be removed as long as value of right at issue or extent of injury exceeds $75,000. *See.* Hambell v. Alphagraphics Franchising Inc. 779 F Supp. 910 (1991).

When determinations by jury in matters at-law are denied, then it becomes federal subject matter jurisdiction, for, the denial of a Constitutional right, which "arises under" United States law determines federal question jurisdiction, which in turn may warrant removal. *See ibid* Caudill v. Blue Cross Blue Shield of NC 999 F2d 74.

Further, the Fifth Amendment of the United States Constitution forbids the United States to "deprive" any person of "life, liberty, or property without due process of law".

In the instant case, the Petitioner's constitutional right to property is at stake, for, the Respondent is seeking to deprive the Petitioner of his right to property by denying him his right to have a Jury decide on the facts surrounding the subsequent parol agreement between him and the decedent lender.

The Petitioner Alexander Pastene also alleges that the case at bar is in compliance with diversity of citizenship as described in Title 28 § 1332, which states that, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $75,000.00, exclusive of interest and costs, and between -(a) citizens of different states; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different states and in which citizens or subjects of a foreign state are additional parties.."

While removal statutes are to be strictly construed with regard to jurisdiction of state courts, federal district courts will not permit crafty tactics to deprive

defendants of a valid statutory right to removal.

In the case *sub judice*, the Respondent is a citizen of the State of Georgia, and the Petitioner is a citizen of the State of South Carolina, thus, complying with diversity of citizenship according to Title 28 § 1332 (1). A second mortgagee, a Richard Gillette from South Carolina is neither a plaintiff nor a defendant in this action.

Jurisprudence indicates that, where the parties are diverse and the amount in controversy is suffioient, a defendant has the statutory right to remove an action from State court to Federal Court. *See* Moss v. Voyager Ins. Co. 43 F. Supp. 2d 1298. Title 28 USCA §§ 1332(a) 1441(a).

Further jurisprudence shows that, when the assertion of district court's subject matter jurisdiction is based on diversity of citizenship, removing defendant must prove that: (a). Plaintiffs are of different citizenship than Defendants; and, (b). the amount in controversy exceeds $75,000. *See* Kanter v. Warner Lambert Co, 52 F.Supp.2d 1126.

In the instant case, the Petitioner complies with all three conditions: subject matter jurisdiction, diversity of citizenship, and controversy in excess of minimum amount, as required by Title 28 § 1332(a).

Additionally, an action based on federal question may be removed without reference to citizenship of the parties. *See* Shwenn v. Sears Roebuck Co. 822 F.Supp 1453. In the case at bar, the Respondent's consistent denial of the Petitioner's right to have a jury determine the factual issues surrounding subsequent contract modification --a legal question-- falls under federal jurisdiction.

In Atlantic v. Ellerman 369 US 355, 82 S Ct 780, the Supreme Court asserted that, a suit in Federal

Court by reason of diversity of citizenship carries with it the right to trial by jury.

In the case at bar the Petitioner is not seeking a jury trial to decide a mortgage foreclosure case, but, seeks the intervention of a jury to decide on the new terms, conditions, and circumstances surrounding a modification of a contract which was guaranteed by mortgage.

Although the court is generally limited to examining the face of the complaint, if it appears that a Plaintiff (Respondent) seeks to conceal the federal nature of his claim by fraud or obfuscation, the court may look behind the complaint to ascertain the facts that would appear in a well-pleaded complaint. *See*. Cheshire v. Coca Cola Bottling Affiliated Inc. 758 Supp 1098. Title 28 USCA §§ 1331, 1447.

As regards Notice of Removal, the Petitioner filed within 30 days of denial by the State Courts.

South Carolina law supports jury trials (Rule 38 SCRCP) to elucidate matters at law. The Petitioner did not seek a Jury trial to resolve a mortgage foreclosure case, but, seeks the intervention of a Jury to elucidate the new terms and conditions of a contract which was secured by mortgage, but was subsequently modified between the parties, to show that there was no default on the loans and no basis for mortgage foreclosure.

In, ibid. Tull v. United States 481 US 412 107 S Ct 1831 24 Led2d 729, it was sensibly established that, if a legal claim is joined with an equitable claim, the right to have a jury decide on the legal aspects of the claims cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought, and thus deprive the party from his right to have a jury decide solely on the legal aspects of the claim.

Additionally, in, *ibid*, Scott v. Neely, 140 US 106,

100 35Led 358, 11 S Ct 712, a defendant cannot be deprived of his Constitutional right to have a jury decide on the legal aspects of a claim contained in his compulsory answer.

Furthermore, recent jurisprudence, *ibid*, such as: Ag Services of America v. Nielsen 231 F3d 726, 730 (10th Cir 2000) (Citing Beacon Theaters v. Westover, 359 US 500, and Dairy Queen v. Wood, 369 US 469, 8 L ed 2d 44). Smith v. Diffee Ford-Lincoln, 298 F3d 965 (10th Cir 2002), supports the right to have a jury decide solely on the facts surrounding the legal claims in an equity action.

Finally, although the Honorable District Court stated that the Plaintiff and Gillette are both residents of South Carolina, and thus complete diversity of citizenship is absent. This is not correct. Gillette was characterized as a defendant by the Plaintiff, whereas he is neither plaintiff nor defendant, but, second mortgagee. Nothwithstanding, the parties on one side are still citizens of a different State from the parties on the other side. The Plaintiff is from Georgia and the defendant is from South Carolina, See 28 U.S.C.§1332.

Equally, the matter in controversy exceed the sum or value of $75,000, see Plaintiff Complaint. And, clearly, federal question jurisdiction under 28 U.S.C. § 1331, is prevalent in the case *sub judice*.

The instant case is a novel one, for, it includes a mortgage foreclosure action brought by the widow of a decedent lender against the Petitioner based on a contract which had been subsequently modified between the decedent lender and the Petitioner, which the Respondent impugns, while she coerced her seriously disabled husband, Geert Jan Pikkert, and the Respondent, Alexander Pastene, to enter into an invalid third mortgage, which contains no meeting of the minds, or exchange of any monies, services or goods, and carries no consideration, whatsoever.

The laws of the United States are patently clear when they state that, when disputed matters at law, such as a contract, exist, even as an incidental part of an equity action, that the right to have a jury decide on the facts, terms, and circumstances, surrounding, *inter alia*, a modified contract, is inviolate.

In the case at bar, the determination of the facts and circumstances surrounding a modified agreement between the lender and the borrower, is of critical importance, because, if default or breach of contract did not take place, then, there cannot be foreclosure, and justice would have gone a long way in eroding one the pillars of our society: private property.

Furthermore, a mortgage is only a guarantee, and not a contract *per se*, whereby, its validity depends on the validity and terms of the contract it guarantees.

In the case *sub judice* the Petitioner believes that this case has been observed through the distorted medium of the Respondent's Complaint, and thus, is being treated as an ordinary mortgage foreclosure. Whereas, all the Petitioner has been asking from the courts *ab initio* is the opportunity to exercise his right to have a Jury determine –not a mortgage foreclosure action– but, the facts, terms and conditions surrounding a new agreement which modified the previous contract between him and the lender.

Wherefore, based on the foregoing, including the Plaintiff's Supplement to Petition for Rehearing, *see* App. 16-20, the Petitioner respectfully prays that this Honorable United States Supreme Court grants him the opportunity to exercise his Constitutional right –either in state or federal court– to have a Jury examine and determine the facts, and terms and conditions surrounding the new agreement with the decedent lender, which was guaranteed by mortgage, and subsequently modified between Geert Jan Pikkert and Alexander Pastene, who never defaulted, so, that justice can be done between the parties..

Conclusion

A writ of certiorari should be granted.

This 5th day of January 2004.

Respectfully Submitted,

Alexander Pastene
Petitioner, appearing *pro se*
P. O. Box 22298
Hilton Head Island
South Carolina 29925
843-384-2693

App.1

Alexander Pastene
Post Office Box 22298
Hilton Head Is, SC 29925
843-384-2693

Honorable Perry M. Buckner December 7th, 2001
Post Office Box 470
Walterboro, South Carolina, 29488-0005

Re; Pikkert v. Pastene

Dear Judge Buckner:

I am writing to you in response to Attorney David S. Mathews' letter to you dated December 6th, 2001, in reference to a Proposed Order of Reference and Finality in the above referenced case, which motions you heard on November 30, 2001, at Jasper County Court of Common Pleas non-jury, where Attorney Mathews withdrew his Motion to Amend, thus making my Motion for Continuance based on his Motion to Amend, moot, and, where you respectfully ruled against my Motion for Jury Trial based on Rule 71 of the SCRCP.

Your Honor, I hereby respectfully beg your reconsideration on my Motion for Jury Trial, and, in the name of brevity, I here offer the following reasons, among others:

1. My partnership was never with the plaintiff, Mrs. Pikkert, but with Mr. Pikkert, her predecesor, instead, with whom I maintained a long-term business relation based on payment-upon-sale-of-the-lots; not on partial payments or an entire amount due. It is my desire to prove the true nature of our business arrangement between Mr. Pikkert and I, before a jury of my peers, with whom I feel more comfortable and confident in explaining my business arrangement with Mr. Pikkert, and thus preclude any actions to foreclose any liens which were voluntarily recorded by me, not as quid-pro-quo in either case in favor of Mr. Pikkert, but, as a means of security in case of

death or incapacitation, especially mine.
2. It is my understanding that, Rule 71 of the SCRCP was never intended to deny any US citizen of his right to a Jury trial as guaranteed by the Seventh Amendment of the US Constitution, but rather, as a way to resolving equity matters both expeditiously and fairly by a judge or referee.

Sincerely

cc. David Mathews
R. Gillette

State of South Carolina County of Jasper	)	In the Court of Common Pleas
Mary Ann Pikkert Plaintiff	)	Civil Action No: 00-CP-27-221
vs.	)	ORDER
Alexander Pastene and Richard Gillette,	)	
Defendants	)	

THIS MATTER CAME BEFORE ME, on a properly scheduled hearing on the Plaintiff's Motion for Leave to Amend the Complaint and for an Order of Reference and on the Defendant Alexander Pastene's Motion for Continuance and for Jury Trial. David Mathews appeared on behalf of the Plaintiff. Defendants Alexander Pastene and Richard Gillette appeared *pro se*. At the hearing, Plaintiff withdrew his motion for Leave to Amend Complaint.
South Carolina Rule of Civ. Proc. 71 state in pertinent part, "actions to foreclose liens and obtaining protection of real property shall be tried by the Court,

and shall be ordinarily referred to a Master pursuant to Rule 53." Counsel for the Plaintiff indicated that the case was an action to foreclose a lien on ral property located in Jasper County and that no reason was indicated as to why SCRCP 71 should not be adhered to.

The Court further inquired of Defendant Alexander Pastene about pertinent facts of the case and requested any facts which would require a departure from SCRCP 71 or be entitled to a jury trial on this foreclosure action. Defendant Pastene offered no facts or reasons why he should be entitled to a jury trial, only that he believed he would be more comfortable with a jury determination.

Based on the statements on counsel for the Plaintiff and Defendant Pastene and there being no objections from Defendant Gillette, I find no legal reason to depart from the language of SCRCP 71 and that no reason a jury trial of this matter should be give; therefore,

IT IS SO ORDERED that the Defendant's Motion for a Jury Trial is DENIED; Defendant's Motion for Continuance is MOOT, Plaintiff's Motion for Leave to Amend the Complaint is WITHDRAWN; and Plaintiff's Motion for an Order of Reference is GRANTED. Upon determining that no party has any known conflicts with attorney Darrell Thomas Johnson of the Jasper County Bar, this matter is hereby referred to Darrell Thomas Johnson, as Special Referee, to make a final determination in this case. Any appeal of the Special Referee's findings may be made directly to the South Carolina Supreme Court. IT IS SO ORDERED.

Perry M Buckner, III
Presiding Judge of the Fourteenth Judicial Circuit

December 12, 2001
Walterboro, South Carolina

App. 4

Alexander Pastene
Post Office Box 22298
Hilton Head Island, South Carolina, 29925
843-384-2693

January 14, 2002

Case No 00-CP-27-221
Pikkert vs Pastene
Motion for
Reconsideration

Honorable Perry M Buckner
Post Offcie Box 470
Walterboro, South Carolina
29488-0005

Dear Judge Buckner:

This is in response to Attorneys Mathew's letter dated January 10, 2002, about your Order in the above referenced case, which motions you first heard on November 30, 2001, and subsequently on January 10, 2002, at Jasper County Court of Common Pleas non-jury, where you respectfully ruled against my motion for Jury Trial based on Rule 71 SCRCP.

Your Honor, I once again respectfully beseech your reconsideration of my Motion for Jury Trial, based on further clarification of pertinent facts.

1. That, I may have been misconstrued and that, the Court may have misunderstood me, as to what I meant about feeling comfortable with a jury determination. That, by comfortable I meant that, faced with the choice between jury and non-jury trial involving issues of fact, not equity, that I preferred a jury trial.

2. That, I can prove that Mr. Gillette --the second mortgagee-- subsequently entered into a similar agreement with me, as the one I entered into with Mr. Pikkert. Furthermore that, Mr. Gillette may grossly distorted the truth to your Court, both verbally during our hearing, and in writing by letter dated 8-6-01, filed with the Clerk of Court 8-8-01, copy of which he, incidentally, did not have the courtesy of serving me.

but, came to my attention only through Atty. Mathews on 11-3-01.

3. That, pursuant to Rule 38 (a)(b)(c)(d) of the South Carolina Judicial Department. I am entitled to choose a jury trial since my original contracts with Messrs. Pikkert and Gillette, were subsequently superseded with new agreements.

Your Honor, I value your advice that I secure an attorney to represent me in my present imbroglio, who hopefully will be as competent as that who represented Antonio (I too enjoy Shakespeare). Meanwhile, my credit is excellent so. Gillette may have slandered me. He now appears to be another Shylock, for, he seems to be after a pound of my flesh. And, while I pray that my destiny is matched pari-passu with that of Antonio's, I hope my trial is not like Gaucester's by Cornwall, where the appearance of justice was preceded by a cruelly predetermined outcome.

Sincerely

State of South Carolina County of Jasper	)	In the Court of Common Pleas
Mary Ann Pikkert Plaintiff	)	Civil Action No: 00-CP-27-221
vs.	)	ORDER
Alexander Pastene and Richard Gillette. Defendants	)	

THIS MATTER CAME BEFORE ME, on January 10,

2002, upon the Motion of Defendant Alexander Pastene to reconsider this Court's Order of November 30, 2001 wherein the Court denied Defendant Pastene's Motion for a jury trial and granted Plaintiff's Motion for an Order of Reference. The Defendant Pastene appeared *pro se*, as did Defendant Gillette. Davis Mathews, Esquire, represented the Plaintiff at the hearing. Pastene argued that he would "feel more comfortable" arguing his case before a jury, but he offered no new information or arguments [sic] as to why this case should be tried by a jury, rather than by a special referee, as provided by Rule 71 SCRCP, and as previously ordered by this Court. Defendant Gillette indicated that he did not object to the Court's prior Order of Reference. At the hearing, I strongly urged Defendant Pastene to obtain the advice and service of legal counsel. I do so again in this Order.

In the light of the arguments of counsel, the consent to the Court's November 30, 2001 Order by the co-defendant Gillette, and with no new matters of law or fact raised by Defendant Pastene, I find no reason presented to justify a reconsideration of my November 30, 2001 Order. Therefore, the Motion for Reconsideration by the Defendant Pastene is respectfully DENIED.

IT IS SO ORDERED

Perry M. Buckner
Presiding Judge of the Fourteenth Judicial Circuit

Walterboro, South Carolina
February 4th, 2002

The South Carolina Court of Appeals

Mary Ann Pikkert, Respondent

v.

Alexander Pastene and
Richard Gillette, of whom Defendants

Alexander Pastene is the Appellant

The Honorable Perry M. Buckner
Jasper County
Trial Court Case No 2000-CO-27-00221

ORDER

Appellant appeals an order of the circuit court denying his request for a jury trial and referring this case respecting foreclosure of real estate to a special referee. The order referring the case to a special referee in a foreclosure action is not immediately appealable. See North Carolina Fed. Sav.& Loan Ass'n v. Twin States Dev. Corp, 289 S.C.480, 347S.E. 2d 97(1986); Williford v. Downs, 267 S.C. 319, 218 S.E.2d 242 (1975); Rule 71 SCRCP. Accordingly, the appeal is dismissed without prejudice.

IT IS SO ORDERED

William J. Howard, J.

Columbia, South Carolina
March 20, 2002

cc. Alexander Pastene
David Mathews, Esquire
The Honorable Margaret Bostick Filed 3-22-02

The South Carolina Court of Appeals

Mary Ann Pikkert,	Respondent
v.	
Alexander Pastene and Richard Gillette, of whom	Defendants
Alexander Pastene is the	Appellant

The Honorable Perry M. Buckner
Jasper County
Trial Court Case No 2000-CO-27-00221

ORDER

Appellant appeals a circuit court order denying his motion for a jury trial and granting respondent's motion for an order of reference. The appeal was dismissed without prejudice because the order is not immediately appealable. Appellant petitions for reconsideration of the order dismissing his appeal. He also moves for permission to submit a late reply to the return filed by respondent. Respondent opposes appellant's petition to reinstate the appeal and requests that sanctions be imposed upon appellant.

After a full view, appellant's motion to submit a late reply is granted. The petition to reinstate the appeal is denied. Brown v. Greenwood Sch. Dist, 344 S.C. 522, 544 S.E.2d 642(Ct.App.2001); MI Co., Ltd. v. McClean, 325 S.C.616, 482 S.E. 2d 597 (Ct. App. 1997). The respondent's request for sanctions is also denied.

IT IS SO ORDERED

Columbia, South Carolina
June 19, 2002

cc. David Mathews, Esq.
Alexander Pastene
The Honorable Margaret Bostick

Filed 6-20-02

The Supreme Court of South Carolina
December 5, 2002

Regular and certified Mail
Mr. Alexander Pastene
P.O. Box 22298
Hilton Head island, SC 29925

Re: Pikkert, Mary v. Pastene, Alexander
2000-CP-27-00221

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

December 5, 2002."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very Truly yours,
s/ Daniel E. Shearouse
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Mary Ann Pikkert	)	C/A No 903-0022-23AJ
	)	
Plaintiff,	)	
vs.	)	ORDER
	)	
Alexander Pastene	)	
	)	
Defendants	)	

The above-captioned case was removed to the United States District Court for the District of South Carolina by the *pro se* defendant in a state court action. The underlying case in the state court was an action for the foreclosure of a mortgage. The defendant has paid the $150.00 filing fee for removing a case to federal court.

In the Notice of Removal filed on January 3, 2003, defendant Pastene contends, *inter alia:* (1) the underlying state court action was commenced by the plaintiff on July 31, 2001 seeking to foreclose based on "contract modification and invalid agreement" in the amount of $58,000. exclusive of interest, and that (2) the defendant seeks removal of his action to Federal Court on the grounds that this court has "original jurisdiction founded on claims or rights arising under the Constitution of the United States, including violation of Right to Trial by Jury as guaranteed by the seventh Amendment..." A review of the Notice of Removal shows that the Plaintiff is a resident of the
State of Georgia, and the defendant is a resident of the State of South Carolina. See Notice of Removal @2. A review of the complaint found in state court shows that Richard Gillette was also named as a defendant in the original complaint as a third party mortgagee. Defendant Gillette is a resident of Beaufort, South Carolina. See Complaint @1.

Discussion

A defendant in a case in a state court may remove that case to a federal district court only if the state action could have been originally filed in a federal district court. 28 U.S.C. § 1441. Generally, a case can be originally filed in federal district court if there is diversity of citizenship under 28 U.S.C. §1332 or [sic] if there is so called "federal question" jurisdiction under 28 U.S.C. §1331. Various federal courts have held that the removal statutes are to be construed against removal jurisdiction, and in favor of remand. See, e.g. Chesire v. Coca Cola Bottling Affiliated Inc. 785 F.Supp. 1098.1102.1990 U.S. Dist Lexis® 12565(D.S.C.1990)(collecting cases); and Bellone v. Roxbury Homes Inc, 748 F.Supp 434,436,1990 U.S. Dist. Lexis®1440(W.D.VA1990). It is well-settled that a Notice of Removal must be filed by a defendant in the state court action within thirty days after the complaint un state court is served or within thirty days after the case becomes removable. See 28 U.S.C. §1446; and Heniford v. American Motors Sales Corp. 471F.Supp328(D.S.C.1979), appeal dismissed, 622 F. 2d 584(4th Cir 1980)[Table]. As noted above, the complaint according to defendant Pastene was filed in state court on July 31, 2001. Therefore, defendant Pastene had until August 30, 2001, to file his Notice of Removal within the thirty day time period. defendant Pastene, however, filed his Notice of removal on January 3, 2003, approximately one and one half years beyond the deadline.

Although the Notice of Removal was not timely filed by defendant Pastene, a plaintiff's objection to an untimely removal by a defendant, in certain circumstances, is a waivable defense *when a federal district court otherwise would have subject-matter jurisdiction*. In other words, if there is federal question or if there is diversity of citizenship, a plaintiff must file a motion to remand within thirty days after the Notice of Removal was filed. 28 U.S.C.§1447(c). If a plaintiff

does not file a motion to remand within thirty days of the filing of the Notice of Removal, the plaintiff waves all procedural defects in the removal. In Re Shell Oil Co., 932F2d 1553,1557,1527 & nn 6-7, 1991 US.App.Lexis®10787(5thCir1991). In the instant case. the plaintiff has not filed an objection to the Removal, although the time to do so has not yet elapsed. Even so, applicable case law and statutory law, including 28 U.S.C. § 1447(c), provide that subject-matter jurisdiction cannot be conferred by estoppel, waiver, or consent. See Buchner v. Federal Deposit Insurance Corp. 981F.2d 816,818,1993 U.S.App Lexis® 990 (5thCir.1993)("Although parties may waive their rights to remove a case or to contest the removal procedure, they may neither confer subject matter jurisdiction on the district court nor strip it of such jurisdiction by agreement or waiver".); and Page v. Wright, 116 F.2d 449,451-455(7thCir 1940), cert. dismissed[on motion of counsel for the petitioner], 312 U.S. 710(1441). Cf. Firestone Tire & Rubber Co v. Risjord, 449 US 368, 379 & n 15(1981)(jurisdictional ruling cannot be made prospective only). As a result, even is a plaintiff fails to object to a Notice of Removal within thirty days after the Notice of Removal is filed, a federal district court must still remand the case to state court if there is no federal question jurisdiction or diversity of jurisdiction. In the case at bar, even if the Notice of removal was not timely filed, and even though the plaintiff has, to date, failed to object to the Removal within the time limits established by 28 U.S.C.§1447(c), this case must still be remanded to the Court of Common Pleas, Fourteenth Circuit. See Williams v. AC Spark Plugs Division of General Motors Corp., 985F2d783,786,1993 US App. Lexis®4440(5th Cir.1993), and 28 U.S.C. §1447(c). Although a federal court is not bound by the parties' characterization of the case or its appropriate parties, a district court must look first at the plaintiff's complaint in a state court to determine if "federal question"

jurisdiction is present. Lyon v. Centimark Corp., 805 F. Supp 333, 334, 1992 US Dist. Lexis® 17312 (CE.D.N.C1 992). District courts are authorized to disregard such characterizations only to avoid "unjust manipulation or avoidance of its jurisdiction. Lyon v. Centimark Corp. 805F.Supp.at 334-335.

The complaint originally filed by the plaintiff in the Court of Common Pleas does not involve federal question juris. This is because the original case filed in state court involves a mortgage foreclosure. Typically, mortgage foreclosures are matters of state law, unless there is diversity of citizenship. Defendant Pastene alleges that diversity exists. The diversity statute, 28U.S.C. § 1332(a) requires **complete** diversity of the parties and an amount in controversy in excess of seventy-five thousand dollars ($75,000.00)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between-

(1) oitizens of different states[.]

28 U.S.C.§1332. Complete diversity of parties in a case means that no party on one side may be a citizen of the same State as any party on the other side. See Owen Equipment & Erection Co v. Kroger, 437 U.S. 365, 372-374 & nn.13-16 (1978). This court has no diversity jurisdiction under 28 U.S.C.§1332 because plaintiff and defendant Gillette are both residents of South Carolina. Hence, complete diversity of parties is absent in the case *sub judice*.

Accordingly, for the foregoing reasons, IT IS ORDERED that this matter be remanded to the Court of Common Pleas, Fourteenth Judicial Circuit.

AND IT IS SO ORDERED

s/ Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina
January 27, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
US COURTHOUSE ANNEX, 5th Floor
1100 East Main Street
Richmond, Virginia 23219

Mary Ann Pikkert	) Case Number 03-1212
	)
Plaintiff	)
	)
vs.	)
	) Supplement to
	) Petition for Rehearing, and
Alexander Pastene	) Petition for Rehearing En
	) Banc
Defendant	)

TO: The Honorable United States Court of Appeals for the 4th Circuit.

COMES NOW the Defendant, ALEXANDER PASTENE, and alleges to this Honorable Federal Court of Appeals the following:

1. On the subject of **Civil Equal Rights under 28USC § 1443.**

The Defendant believes that grounds for removal in the case at bar may exist based on the fact that, the Defendant was subjected to, *inter alia*, egregious discrimination based on deprivation of civil equality due to his national origin (28USC § 1443(1)(2) and from acts of wanton abuse by State Officials of the State of South Carolina, for which wrongful, reckless, and grossly negligent actions the Defendant has initiated an action now pending in Federal District Court, which denial of equal rights compelled him to modify his contract with the decedent Lender.

That, since the inception of, and consistently throughout, the case *sub judice*, the Defendant

sought to exercise his right to Jury Trial to determine the validity of his contract-modification with the decedent Lender, which along with the deprivations of his civil equal rights, the Defendant alleges to be of Constitutional and exceptional importance.

2. On **Diversity of Citizenship**. The District Court Order states: "the Plaintiff and defendant Gillette are both residents of South Carolina". This is not correct. Gillette is Not a Defendant. Meanwhile, the Plaintiff, MARY ANN PIKKERT, is a resident from the State of Georgia, and the Defendant, ALEXANDER PASTENE, is a resident from the State of South Carolina. Therefore, diversity of parties appears to be present in the case *sub judice*, which diversity may allow for the removal from State court to District court.

3. On **Amount in Controversy**. The District Court Order states that amount in controversy is $58,000. This is not correct.

The Plaintiff's action in the case at bar is in the amount of $127,448.00, together with 12% interest per annum.

4. On **Subject Matter Jurisdiction.**

Nothing in Title 28USC § 1331 precludes Appellate Courts from considering Constitutional issues. *See* 838 F2d 536. Further, a Court of Appeals is an appellate court with the function of considering and rectifying errors. *See* Crutchfield v. US 142 F2d 170, Hall v. Helena 268 FSupp 923.

Meanwhile, 28USC § 1331 on federal question states that, District courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, and 28USC§ 1343 states that the district courts shall have original jurisdiction of any civil action

authorized by law to be commenced by any person, 28USC § 1343(3), to redress the deprivation, under color of State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the US Constitution or any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the US.

Furthermore, for Constitutional purposes, a case arises under the federal law whenever federally question is mere ingredient of a cause of action, as in the instant case, where the Defendant is pleading for his Constitutional right to Trial by Jury.

That, right to Trial by Jury arises under the Seventh Amendment of the US Constitution, and thus constitutes federal question.

That, in the case at bar, Jury Trial is not demanded for the purpose of deciding on a mortgage foreclosure case, which, admittedly, is a State matter, but demanded to determine the terms and conditions of the subsequent modification of the agreement, which had been previously secured by mortgage, but, had subsequently been modified.

Contract modification is a common-law matter triable by Jury.

That, a mortgage is only the guarantee of a valid contract, and not a contract *per se*, and that, without a valid contract there is no valid mortgage. The Defendant also claims section 42 USC §1983, for deprivation of his rights.

5. **On Timeliness to file**. That, the Defendant expressly requested Jury Trial since the inception of the case at bar, and exhausted every appeal within the State system seeking relief for a Jury Trial to resolve a matter which is purely at-law: the determination of modification and validity of a

contract between the Defendant and the decedent Lender, by a jury of his peers.

That, while endeavoring to conform to procedure, and filing within the 30 days required from the day of the State Court Order, the Defendant moved for Removal to District court from State court in a timely manner.

6. **On Concealment by the Plaintiff**. That, from the outset, the Plaintiff seemingly concealed crucial evidence three (3) unsecured promissory notes for three loans made by the decedent Lender subsequent to the cessation of all mortgage monthly-payments by the Defendant to the decedent Lender).

That, the aforementioned subsequent unsecured loans by the decedent Lender to the Defendant corroborate Modification of Contract as claimed by the Defendant since the inception of the case at bar, between him and the decedent Lender, who is NOT the Plaintiff in this case.

7. **Complete Preemption Doctrine**. That, the Constitutional right to Trial by Jury (Seventh Amendment of the Constitution) is so strong and basic to our overall justice system that it should be preserved inviolate above all, as in the case at bar where the Defendant is demanding it to eluoidate the facts surrounding a common-law matter (a modification of a contract previously secured by mortgage) which deprivation of Constitutional right may have sufficient preemptive force to provide a legal basis for removal from State court to Federal court, even if the Plaintiff appears to have framed her complaint according to the well-pleaded complaint rule, by alleging violation of State law, while seemingly purposely keeping fundamental evidence undisclosed.

Additionally, the Defendant believes that

grounds for removal based on defensive preemption may exist as substantive legal defense in the case at bar.

8. **On the Constitutional Right to Property**. That, the Defendant is desperately defending his right to Property, as guaranteed by the Fourteenth Amendment of the United States Constitution, from a Plaintiff who seems determined to unfairly dispossess the Defendant from the only piece of property he owns, by not honoring an agreement between the Defendant and her late husband, the decedent Lender.

WHEREFORE, the Defendant pleads with this Honorable Federal Court of Appeals:

1. That, it remands the case *sub judice* to the District Court for Reconsideration in view of new evidence discovered and submitted after the Honorable District Court issued its Order.

2. That, it grants a trial by jury to elucidate the facts surrounding the subsequent contract-modification between the Defendant and the decedent Lender, who is not the Plaintiff in the case *sub judice*.

Respectfully Submitted

ALEXANDER PASTENE
Appearing *pro se*
Post Office Box 22298
Hilton Head Is., S.C. 29925
843-384-2693
June 9th, 2003

cc. David S. Mathews, Esq.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

NO. 03-1212

MARY ANN PIKKERT,

Plaintiff - Appellee,

versus

ALEXANDER PASTENE

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Robert S. Carr, Magistrate Judge. (CA-03-22-23AJ)

Submitted: May 15, 2003 Decided: May 20, 2003

Before Luttig and King, Circuit Judges, and Hamilton, Senior Circuit Judge

---

Dismissed by unpublished per curiam opinion

Alexander Pastene, appellant Pro Se. David Scott Mathews, Jasper County Attorney's Office Ridgeland, South Carolina for Appellee.

Unpublished opinions are not binding precedent in this circuit. See local Rule 36(c)

PER CURIAM: Alexander Pastene seeks to appeal the magistrate judge's order remanding his civil action to state court. The magistrate judge's remand order is not reviewable. See 28 U.S.C. § 1447(d) (2000). Accordingly, we dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. DISMISSED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

FILED June 30, 2003

No.03-1212
CA-03-22-23AJ

Mary Ann Pikkert

Plaintiff, Appellee

v.

Alexander Pastene

Defendant-Appellant

On Petition for Rehearing and Rehearing En Banc

The Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and as the panel considered the petition for rehearing and is of the opinion that it should be denied. IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court, */s/* Patricia S. Connor
Clerk

* * * * *